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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 94

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE VAN CAMP & SONS COMPANY,
Appellant,

v.

AMERICAN CAN COMPANY,
THE VAN CAMP PACKING COMPANY,
Appellees.

BRIEF OF APPELLEES.

L. A. WELLES,
WM. H. THOMPSON,
Solicitors for Appellee American Can Company.
HENRY H. HORNBROOK,
Solicitor for Appellee The Van Camp Packing Company, Inc.
SAMUEL D. MILLER,
FRANK C. DAILEY,
ALBERT L. RABB,
Of Counsel for Appellee American Can Company
PAUL Y. DAVIS,
Of Counsel for Appellee The Van Camp Packing Company, Inc.

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GEORGE VAN CAMP & SONS COMPANY,
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AMERICAN CAN COMPANY,
THE VAN CAMP PACKING COMPANY, INC.,
Appellees.

No. 846

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

The two questions certified by the Circuit Court of Appeals are precise and comprehensive in their form, and appellant's suggested restatement is unduly abbreviated and unnecessary.

ARGUMENT.

Point I.

Section Two of the Clayton Act Refers Only to Competition Between the Person Granting the Discrimination and his Competitors and to Monopoly to be Enjoyed by the Person Granting the Discrimination.

Appellant contends that the correct answer to the certified questions turns upon the meaning of the phrase "any line of commerce" as used in Section 2 of the Clayton Act; that the word "any" obviously applies to every line of commerce; and hence that the phrase "any line of commerce" must include the line of commerce in which the person receiving the unlawful discrimination is engaged.

Appellees do not contend that Section 2 does not apply to every line of commerce. What we do contend is that the phrase "any line of commerce," as used in said Section 2, has reference only to the line of commerce *in which the discriminator is engaged*, whatever that commerce may be.

The very phraseology of the Act shows that Section 2 does not apply to discrimination, the effect of which may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which the purchaser from the discriminator is engaged.

(1) Neither the word "any" nor the phrase in which it appears is to be read, as appellant insists that

it be read, as if it stood separate and apart from the rest of Section 2. It is an integral part of said Section and is to be read and construed in the light of the other phrases found therein. *Merrill-Ruckgaber Co. v. United States*, 241 U. S. 387, 392. When so read, it will be apparent that the "line of commerce," competition in which is to be protected and monopoly in which is to be prevented, is and can only be that commerce in which "it shall be unlawful for any person to be engaged in" and "in the course thereof" to make the prohibited discriminations.

Such is the primary and natural meaning of the phrase "any line of commerce" and to construe that phrase as including a line of commerce in which the discriminator does not engage would be a strained construction not required or justified by anything in the Act or in the history of the Act. It is not reasonable to suppose, and Congress did not fear, that any person would go out of his way to create for the benefit of some other person a monopoly or a lessening of competition in a business in which he himself was not engaged.

When Section 2 is applied directly to appellee American Can Company it forbids the American Can Company, which is engaged in commerce in tin cans, in the course of its commerce in tin cans, unlawfully to discriminate in price between the appellee The Van Camp Packing Company, Inc., and appellant or other purchasers of its tin cans, where the effect of such discrimination may be to substantially lessen competi-

tion or to tend to create a monopoly *in commerce in tin cans.* The commerce in which appellee The Van Camp Packing Company, Inc., as well as appellant, is engaged is *the canned goods business,* an entirely different line of commerce. An empty tin can is not a can of beans. The lessening of competition in or monopolizing of the tin can business is not equivalent to lessening competition in or monopolizing the canned goods business. The natural, proximate, and necessary result of the granting of improper price discriminations or the making of tying contracts by a manufacturer of tin cans would be to lessen competition and to create a monopoly in the tin can business; and not in the canned goods business, or the wholesale provision business, or the retail grocery business.

(2) Such is the necessary construction of the same words used in Section 3 of the Act and unless the context compels a different construction, which it does not, the language of Section 3 should be given a like construction.

Briefly stated, the effect of Section 3 of the Clayton Act is to make unlawful a sale or lease, or the fixing of a price or discount upon a sale or lease, upon condition that the purchaser or lessee shall not deal in the goods of competitors of the seller or lessor, where the effect of the transaction "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

It is directed at the so-called "tying contracts," contracts by which the seller or lessor of a commodity,

either by express agreement or discriminatory dealing, compels his customers to refrain from dealing with *his* competitors. It is impossible to conceive of any competition which such conduct would lessen except competition between the seller or lessor and his competitors. Such an arrangement would directly obstruct the free flow of the goods of competitors of the seller or lessor into the normal channels of trade, but it would have no effect upon competition between the purchasers or lessees.

It is also impossible to conceive of any monopoly which such conduct would foster except a monopoly to be enjoyed by the seller or lessor. By preventing the merchandise of competitors of the seller or lessor from finding an outlet through the normal channels of trade, the prohibited dealings would directly tend to create a monopoly of the trade for the seller or lessor, but would not create a monopoly in any purchaser or lessee.

The only conduct prohibited is conduct by the seller or lessor ("the person engaged in commerce") which prevents *his* customers from dealing with *his* competitors. The only monopoly which such prohibited conduct would tend to create is a monopoly by the seller or lessor. The only competition which such conduct would tend to lessen is competition between the seller or lessor and *his* competitors.

Consequently, the word "competition" in the last clause of Section 3 of the Clayton Act can refer only to competition between the seller or lessor whose con-

duct is regulated and his competitors; the word "monopoly" in the same clause can refer only to a monopoly to be enjoyed by the seller or lessor, in the products forming the subject matter of the discriminatory practice.

It must be apparent therefore, that so far as Section 3 is concerned, the phrase "in any line of commerce" does not in any way broaden the effect of the words "competition" or "monopoly" to include competition other than that between the seller or lessor and his competitors, or to include "monopolies" other than a monopoly to be enjoyed by the seller or lessor; because the prohibited acts would have no effect to lessen or produce, respectively, any other competition or monopoly.

So far as Section 3 is concerned it follows that the effect of the phrase "in any line of commerce" is simply to apply the prohibition of the act to all sorts of trade, to make it apply indifferently to the butcher, baker and candlestick maker; and not to prohibit sellers and lessors from making sales or contracts of sale, tending to suppress competition between outsiders not competing with them or tending to create monopolies in other than themselves.

(3) The word "competition" in that clause of Section 2 now in question should be given the same meaning as the same word in the clause "made in good faith to meet competition," and the word in the latter clause clearly refers to competition with competitors of the seller, the person "engaged in commerce," and to no other competition.

It is elementary that identical words in the same Act or section should receive the same construction, unless the context compels the contrary. No context compels the giving of different constructions to the word "competition" in the two different clauses where it occurs in Section 2. The latter clause in which the words appear permits the seller, "the person engaged in commerce," to make price discriminations to meet "competition." The only "competition" which could conceivably be referred to in this clause is competition between the seller "the person engaged in commerce" and his competitors, because this is the only "competition" which could be *met* by a price difference. This meaning of the word "competition" so clearly appearing in one clause should be applied to the same word in the clause now in question, since nothing indicates a contrary meaning.

The only attempt to define competition in Section 2 is contained in the provision that nothing contained in the section shall prevent discrimination in price in the same or different communities made in good faith "to meet competition." Competition here must mean that between the discriminator and his competitors, because the former cannot possibly know what competition will subsequently take place between his customer and the latter's competitors when gooods are sold later, nor could he possibly "meet" any such competition, much less control it.

(4) The word "commerce" is used three times in the first sentence of section 2. In the phrases "engaged

in commerce," and "in the course of such commerce," it plainly refers only to the "line of commerce" engaged in by the "person" whose conduct is regulated. Where the word next appears, in the phrase "in any line of commerce," appellant insists that its use is not so restricted; that it refers as well to lines of commerce in which "the person" regulated is not engaged, and that the phrase "in any line of commerce" was inserted for the purpose of broadening the application of the words "monopoly" and "competition."

In examining this argument, it is noteworthy that the phrase "in any line of commerce" is wholly unnecessary and superfluous, if its purpose is to achieve this result. If the phrase "in any line of commerce," found at the end of the first sentence, had been omitted, the prohibited effect would have been "to substantially lessen competition or to create monopoly." The literal and grammatical interpretation of this language would, without restriction, have been as broad or broader than that for which appellants now contend. The literal interpretation would cover any and all monopolies, whether or not enjoyed by "the person engaged in commerce," would condemn any and all substantial lessening of competition, whether competition with such "person" or between others.

Although, as has been shown, the omission of the phrase "in any line of commerce" would have made the literal application of the act to all monopolies and all lessening of competition, whether or not in the discriminator's "line of commerce," much more clear than

at present, we believe that it may be asserted with confidence that in view of the very remote possibility that discriminatory practices would ever be used to produce monopoly or suppress competition in a line of commerce other than that engaged in by the discriminator, the construction now advocated would scarcely have been suggested, had the phrase been omitted.

We submit, therefore, that it is not proper to infer that the phrase "in any line of commerce" was inserted to extend the application of the words "monopoly" and "competition," since, as above suggested, it was wholly unnecessary for that purpose. The phrase must therefore have been inserted for some other purpose, and such other purpose is not difficult to ascertain.

The word "commerce," in its general signification, covers both inter-state and intra-state commerce. As used in the Clayton Act, however, the term is expressly limited in section 1 of the Act, U. S. C. A. Tit. 15, Sec. 12, to "trade or commerce among the several states," etc., i. e., commerce over which the Constitution vests regulatory power in Congress.

The most obvious effect and therefore the most obvious purpose of the phrase "in any line of *commerce*" is restrictive and not extensive, to confine the operation of the Act to monopoly and lessening of competition resulting to trade in interstate and foreign commerce from the prohibited discriminations in interstate and foreign commerce.

In order to give this phrase meaning, it is therefore wholly unnecessary to ascribe to it the effect

asserted by appellant, an effect which obviously hinders competition in the line of commerce engaged in by the trader whose conduct is in question; a hindrance which appellants seek to impose because of a wholly fortuitous and unsought advantage accruing to persons in other lines of commerce.

(5) It is apparent from the Congressional Journals (hereinafter more particularly referred to) that the creation of monopolies for the benefit of customers of a price discriminator, or the suppression of competition between such customers, was not one of the evils in contemplation upon the passage of the Clayton Act. It is likewise apparent that only a very few, if any, persons engaged in commerce may be expected to grant price discriminations with the purpose of effecting monopoly or suppressing competition for the sole benefit of their customers. Where price discriminations operate through creation of monopoly or suppression of competition among competitors of the discriminator, to create monopoly or suppress competition in the line of commerce where in the discriminator is engaged, an evil result is achieved which the framers of the Clayton Act had reason to fear, and for which they provided a remedy. On the other hand, where a person engaged in commerce, for the legitimate advancement of his own business, without seeking or causing monopoly or suppression of competition in the line of commerce in which he is engaged, makes price discriminations which result in the creation of monopoly or suppression of competition among his customers,

it must be apparent that such interference with commerce, so far as the discriminator is concerned, is wholly fortuitous, and an evil, if it be an evil, which the framers of the Clayton Act had no reason to fear, and no motive to prohibit.

It is also apparent that whatever restrictions are placed upon the freedom of action of "persons engaged in commerce" must tend to some extent to interfere with commerce and restrict that freedom of competition which it is the policy of the anti-trust laws to preserve. When restriction is directed at those acts which selfishly motivated persons engaged in commerce may be expected to commit to create monopolies and suppress competition for their own benefit, its beneficial effect in preserving freedom of competition is understandable. When, however, it is attempted to restrict the otherwise lawful competitive practices of persons engaged in commerce, not because of any tendency to create monopoly or suppress competition for the persons whose conduct is in question, but solely because of a deleterious effect upon competition between others, the fact that deliberate design to achieve such results is not to be anticipated, so that monopoly and suppression of competition thus caused must be of rare occurence, coupled with the very apparent restriction upon the competitive freedom of the person whose conduct is regulated, gives every reason to scrutinize carefully the language sought to be so construed. As was said by this Court in *Federal Trade Commission v. Gratz*, 253 U. S. 421, at page 428,

"If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

It is apparent that the construction of the Clayton Act advocated by appellant will impose a very great restriction upon the discretion of appellee Can Company in its choice of business practices; a restriction which will exclude from its choice practices of a highly competitive nature, practices adopted without any illegitimate motive, and practices which are not alleged to result in any illegitimate advantages to it. Such a result is clearly out of harmony with the policy of all the Anti-Trust Laws, as above indicated, and, unless such a construction is an absolutely necessary result of the language used, we submit it should not be adopted.

Therefore we submit that the language of the Act requires the phrase "any line of commerce" to be construed as referring only to the line of commerce in which the discriminator is engaged.

POINT 2.

The Construction of Section 2 of the Clayton Act Suggested by Appellees is in Harmony With the Policy of the Anti-Trust Laws.

Appellant asserts that a negative answer to the questions certified would be wholly at variance with the policy of the other Anti-Trust laws of the United

States. The argument advanced is that both the Sherman Act and the Federal Trade Commission Act safeguard competition among the retailers dealing in the goods of one manufacturer; that in the course of its opinion in *Federal Trade Commission v. Beech-Nut Packing Company*, 257 U. S. 441, 454, the supreme Court denounced a certain course of conduct as restraining

> "the freedom of competition in the channels of interstate trade which it has been the purpose of all the Anti-Trust Acts to maintain"

and that as that opinion was written after the Clayton Act came into effect, the court must have meant that the Clayton Act was one of the Anti-Trust Acts which protected competition among retailers dealing in the goods of one manufacturer.

But not only is appellant relying solely upon a dictum in that opinion of the Supreme Court, but it places thereon a most strained construction. An examination of the entire opinion makes it clear that this Court referred merely to freedom of competition in general as the purpose of all the Anti-Trust Acts; and not simply to competition among retail distributors by reason of retail price fixing, a matter nowhere condemned in the Clayton Act.

Appellant overlooks the fact that the Clayton Act, as shown by its preamble, is supplementary. It was intended to cover not what had previously been covered by the Sherman Act or the Federal Trade Commission

Act, but certain matters which had previously been unprovided for; to stop gaps, not to overlap the entire field theretofore dealt with. As this Court said in *United Shoe Machinery Co. v. United States*, 258 U. S. 451, 460, referring to the case of *Standard Fashion Co. v. Magrane Houston Co.*, 258 U. S. 346.

> "In that case we pointed out that the Clayton Act was intended to supplement the Sherman Act and within its limited sphere established its own rule."

POINT 3.

The Only Reported Decisions Support Appellees' Contention.

During the time the Clayton Act has been in force, some fourteen years, the only reported decisions upon the question here in controversy are from the Circuit Court of Appeals for the Second Circuit; and its decisions, for the review of each of which a writ of certiorari was applied for but denied, each held that the granting of discriminatory prices by a seller to a purchaser, the effect of which may be to restrict competition, not between the seller and its competitors but between the purchaser and its competitors or where the discriminatory prices tend to create a monopoly not in the seller but in the purchaser, does not constitute a violation of Section 2 of the Clayton Act.

The case of *Mennen Company v. Federal Trade Commission*, 288 Fed. 774, arose on a petition by the

Mennen Company to review an order of the Federal Trade Commission requiring said company to desist from certain methods of competition on the ground that they were in violation of Section 2 of the Clayton Act. The Mennen Company had adopted a plan for the allowance of trade discounts in the marketing of its several products such as talcum powder, tooth paste, etc. in pursuance of which plan it classified its customers into two classifications and allowed the members of such groups different discount rates. It was alleged that such discounts were made irrespective of quantity and quality or grade of the commodity sold without regard to difference in cost of selling or transportation, that such discounts were not made in good faith to meet competition; and it was expressly alleged that such practice tended unduly to hinder competition between distributors of the petitioner's products and that the effect of such discrimination might be to substantially lessen competition in the distribution of the Mennen Company's products or betweeen distributors thereof. The Circuit Court of Appeals reversed and set aside the Federal Trade Commission's order on Mennen Company to cease and desist from such practice. *The Court directly held that the record showed not even a contention that the practice complained of lessened competition as between the Mennen Company and its competitors but that at the most the practice decreased competition among its customers or those who desired to become such customers.* The Court pointed out that Section 2 of the Clayton Act in the

form in which it was originally reported out of committee was intended to protect both kinds of competition,—competition between the manufacturer and his competitors on the one hand as well as competition between the customers of the manufacturer on the other, but that the Bill was changed before enactment so as to eliminate that effect; that the reports of the Judiciary Committees and the statements of those in charge of the bill on the floor of either House neither indicate nor suggest the interpretation which the Federal Trade Commission sought to put upon said Act; and, by Rogers, J., said:

> "The Clayton bill, as originally introduced, did not contain the words 'where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce,' now found in section 2, but contained the words 'with the purpose or intent thereby to destroy or wrongfully injure the business of a competitor, of either such purchaser or seller.'
>
> The record filed in this court shows no contention by the Commission that the practices complained of have lessened competition as between Mennen Company and its competitors, but it shows at the most that the practices have decreased competition among the Mennen Company's customers, or those desiring to become such. And it is said that if the phraseology above quoted as originally contained in the bill had been retained therein upon final passage instead of the phraseology, likewise above quoted, which was substituted therefor, there might be just ground for the claim that the Clayton Act prescribes practices which injure competition among the customers of the manufacturer, and

not merely competition between such manufacturer and his competitors. But the elimination of the phraseology contained in the bill as originally reported and the substitution therefor of the phraseology in the form in which the bill was finally enacted strongly indicates that Congress did not have in contemplation the former character of competition but only the latter.

In the phraseology of the bill as originally reported the intention was unmistakably expressed that it was intended to protect by its prohibitions both kinds of competition, competition between the manufacturer and his competitors, as well as competition between customers of the manufacturer. The act as reported prohibited acts 'with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor, of either such purchaser or seller.'

We have recently had occasion to point out that in the case of an ambiguous or obscure statute the intent of Congress may be gathered from statements in reports of committees having the legislation in charge in either House of Congress. *U. S. ex rel. Fazio v. Tod* (C. C. A.), 285 Fed. 847, decided November 13, 1922. And statements made on the floor of either House by the committee in charge of the bill in the course of its passage may in like manner be considered. See *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 475, 41 Sup. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196.

It is a matter of common knowledge that prior to the enactment of the Clayton Act a practice had prevailed among large corporations of lowering the prices asked for their products in a particular locality in which their competitors were operating for the purpose of driving a rival out of business. Such lowering of prices was maintained within the particular locality

while the normal or higher prices were maintained in the rest of the country; and this practice was continued until the small rival was driven out of business, whereupon the prices in that locality would be put back to the normal level maintained in the rest of the country. The Clayton Act was aimed at that evil. This appears from the Report of the Judiciary Committee of the House of Representatives from which we quote as follows:

> 'Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. * * *
>
> 'The necessity for legislation to prevent unfair discriminations in prices with a view of destroying competition needs little argument to sustain the wisdom of it. In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Company, the American Tobacco Company, and others of less notoriety, but of great influences—to lower prices of their commodities, oftentimes below the cost of production in

> certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. * * *
>
> 'In seeking to enact section 2 into law we are not dealing with an imaginary evil or against ancient practices long since abandoned, but are attempting to deal with a real, existing, widespread, unfair and unjust trade practice that ought at once to be prohibited in so far as it is within the power of Congress to deal with the subject.'

There is nothing in the Report of the Committee which shows that in reporting the bill the Committee had in mind anything more than the suppression of the evil above referred to.

This substitution in the final stages of the Clayton Bill of the clause to which we have referred plainly indicates the intent of Congress to exclude from the operation of the section mere competition among 'purchasers' from the 'seller' or 'person' who allowed or withheld the discount and to include therein only competition between such 'seller' or 'person' and the latter's own competitors. It was the latter class of competition and not the former which had been 'the common practice of great and powerful combinations engaged in commerce' to which the Committee in its report referred. And there is nothing in the report of the Judiciary Committee, of either House, or in anything said on the floor of either House by those in charge of the bill, which indicates or suggests any such interpretation which the Commission in this case has placed upon the act."

The Supreme Court denied a petition for writ of certiorari to review that decision: 262 U. S. 759.

A later decision of identical effect by the same Court (Judge Hough participating in lieu of Judge Rogers) is *National Biscuit Co. v. Federal Trade Commission*, 299 Fed. 733. A writ of certiorari to review that decision was denied: 266 U. S. 273.

What that Court said with respect to the proper construction of Section 2 of the Clayton Act is not pure obiter dictum, as appellant argues, but is a judicial declaration upon a question directly presented in the litigation.

Appellant attacks the Mennen case as unsound in failing to point out any ambiguity in Section 2 of the Clayton Act so as to justify a resort to the legislative history of the Act. But the words "monopoly" and "competition" in Section 3 of the Clayton Act being limited in their application by the very necessities of the situation to that monopoly which is to be enjoyed by or that competition which is with the seller or lessor whose conduct is regulated, when the Federal Trade Commission came into court in the Mennen case suggesting that the identical language of Section 2 should be more broadly construed to include competition between purchasers from the seller (manufacturer) whose conduct is regulated, as well as competition between him and his competitors, and to include monoply to be enjoyed by purchasers from such a seller, there immediately arose the question whether

identical language in two sections of the same Act should be given a difference in meaning: a clear suggestion of ambiguity. If the Circuit Court of Appeals for the Second Circuit had considered that no such ambiguity existed it must at once have decided the question adversely to the Trade Commission, since the phrase "lessen competition or tend to create monopoly in any line of commerce" cannot possibly have the broad application in Section 3 which appellant in this case and the Trade Commission in the Mennen case sought to ascribe to the identical language of Section 2. Instead of thus summarily passing upon the contention of the Trade Commission, the Court very properly took into consideration the Journals of Congress to determine whether that contention had any basis whatever; and correctly arrived at its decision.

Appellant asserts that the decision in the Mennen case is valueless as a precedent because of the court's misapprehension of the history of the Clayton Act.

Section 2 of the Clayton Bill, as reported from committee, contained the phrase:

> "with the purpose or intent thereby to destroy or wrongfully injure the business of a competitor of either such purchaser or seller,"

for which there was substituted in the Bill as enacted, the following:

> "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The action of Congress in deliberately eliminating the former phrase from the Bill as enacted must be taken as its distinct refusal to extend the prohibition of that section to competition between purchasers from the discriminator, unless the expression "any line of commerce" can fairly be construed to include competition between purchasers from the discriminator.

In an effort to show that the eliminated phrase is synonymous with or rather is included in the substituted phrase, appellant really relies upon a statement made by congressmen during consideration of the Bill by the House, to the effect that the new language gave that section more breadth and elasticity.

A comparison between Section 2 in its entirety as reported from committee and as finally enacted, discloses that the section as reported, prohibited price discriminations when done with intent to injure; but as enacted, prohibited price discriminations regardless of intent when tending to create monopoly or to lessen competition. In other words, the Bill, as reported, did not apply to discriminations when the intent to injure was absent, but as enacted it applied to all acts having the prohibited tendency to lessen competition or monopolize, whether the intent to injure was present or absent. The Bill, as enacted, thus applied the prohibition to cases to which the Bill as reported did not apply, so that the application of the Act was broadened, irrespective of what construction is to be given to the words, "any line of commerce." Therefore the words of Congressman Webb were justified and are

explained without the necessity of extending the meaning of the phrase "in any line of commerce" to include not alone the commerce in which the discriminator is engaged, but the commerce in which the purchasers from the discriminator are engaged.

This conclusion finds support in the congressional debates. It does not appear that the question of restraint of competition among purchasers from the seller was discussed by the Conference Committee. In fact, in all the discussions in both House and Senate, there is no intimation that the purpose of the Act was to protect competition among purchasers from the seller, or in any other business than that in which the discriminator was engaged. The discussions and debate show that the language in which Section 2 was originally cast was felt to be restrictive, not in the scope of the subject-matter covered (as appellant would have it believed), but merely because of the difficulty of proof in litigation. It was supposed that if it were necessary to prove "intent and purpose" as in an ordinary criminal action, the burden on the Government or upon an individual complaining would be too much; and that an easier standard in proving violations of the Act would be afforded by simply prohibiting discriminations, *the effect* of which might be substantially to lessen competition or tend to create a monopoly.

The fact that the committee's report consulted by the court was made before the language under discussion became a part of the Act, stressed by counsel for

appellant as an element of weakness in the court's reasoning, is rather an element of strength. The significance of the argument is that Congress considered a committee report pointing out as evils resulting from predatory price cutting, the suppression of competition by competitors of the price cutter, and the creation of monopolies in the price cutters (not mentioning as evils the suppression of competition between purchasers from the price cutter or the creation of monopolies in such purchasers), and suggesting as a test of illegality an *intent to injure* the business of competitors of either purchaser or seller; and yet, while enacting a law presumably to remedy the evils mentioned by the committee, Congress saw fit to eliminate intent to injure business as a test, and substituted a provision setting up as the test of illegality the tendency to lessen competition or to create monopoly, i. e., the competition *between sellers* and the *monopoly by sellers* which alone were pointed out as *lessened* and *created* by the existing practices.

The point of the argument is that the bill was changed before it became a law, changed in the only feature affording any basis for the construction advanced by plaintiffs in this case, changed by language which makes it strike *directly* at lessening competition and at monopoly instead of *indirectly* by denouncing price cutting with intent to injure. When, therefore, the word "competition" in the final draft is compared with the same word as used in the report, it must be apparent that it means, as the court con-

cluded, *competition between the price cutting seller and his competitors, not competition between purchasers of his commodities*, because, as the court aptly observed:

> "It was the latter class of competition and not the former which had been the common practice of great and powerful combinations engaged in 'commerce' to which the committee in its report referred."

Respectfully submitted,

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September 24, 1928.

APPENDIX.

Pertinent Provisions of Clayton Act.

Section 2 of the Clayton Act, (U. S. Code, Title 15, Section 13), reads as follows:

> *"Price discrimination between purchasers to lessen competition or create monopoly.*—It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

Section 3 of the Clayton Act, (U. S. Code, Title 15, Section 14), reads as follows:

> *"Sales made or prices fixed on agreement not to use competitor's goods where effect is to lessen*

competition or create monopoly.—It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof, or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 16 of the Clayton Act, (U. S. Code, Title 15, Section 16), reads as follows:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and showing that the danger of irreparable loss or dam-

age is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."